

tion 7, the defendants were liable to pay for the arrears of property tax. Counsel relied on the decision of the Privy Council in *Kaolim Pte Ltd v United Overseas Land Ltd*.¹ In that case, the Privy Council held that the purchasers, the respondents, were not liable for arrears of property tax which was notified by the Comptroller after the respondents' tender was accepted in a mortgagees' sale. The sale was subject to a special condition 16 that 'The property is sold subject to ... all charges ... affecting the property made or served whether before on or after the date of sale'. The appellant contended that this special condition overrode condition 6 of the (Revised) Singapore Conditions of Sale (which corresponded to condition 6 of the 1981 Conditions). The Privy Council rejected the submission on the ground that reading the conditions as a whole, there was no inconsistency between special condition 16 and general condition 6 as the word 'charge' in the special condition could not be given such a wide meaning as to include an outgoing like property tax.

Counsel for the defendants contended that condition 18 of the conditions of tender conflicted with conditions 6 and 7 of the 1981 Conditions and that by virtue of condition 16, condition 18 must be given effect to. In essence, the submission was that condition 18 was inserted to ensure that the defendants would not be liable for property tax after completion unless it was due and outstanding on or before completion, whereas condition 7 provides for the opposite result. I agree with this submission. The words 'due and outstanding' in condition 18 are clear and unambiguous. On the facts, there was no property tax due and payable in respect of the property at the date of completion. Condition 18 would serve no purpose if it were construed, as contended by counsel for the plaintiffs, to have the same effect as condition 7 of the 1981 Conditions. The words 'shall in any other case be met by the purchaser' reinforce the object of this condition. *Kaolim's* case¹ does not assist the plaintiffs in the construction of conditions 16 and 18.

Counsel for the plaintiffs also suggested that the retrospective order of the Comptroller of Property Tax made the property tax due and outstanding on the date of completion. I do not think that is the correct characterization of the Comptroller's action. His authentication of the annual value made the property tax payable on such date in respect of a period before that date. The property tax in question was never due and outstanding on the date of completion. It became due and payable on the date of authentication.

For the above reasons, I dismissed the plaintiffs' claim with costs.

Claim dismissed.

Solicitors: *Jing Quee Chin Joo & Teck Hui; Tan Rajah & Cheah.*

Reported by Terence Tan Bian Chye

A City Development Ltd v Goh Yoke Hian & Ors

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS

NO 1090 OF 1987
CHAN SEK KEONG J
23 FEBRUARY 1990

B

Land Law — Charging order — Claim on property between equitable mortgagees and chargees — Whether interests of equitable mortgagees and chargees are conflicting — Whether s 41(1) of the Land Titles Act applicable — Whether charging order absolute defeasible by the bankruptcy of the judgment debtor — Land Titles Act (Cap 157, 1985 Ed), s 41(1)

C

Land Law — Caveats — Priority — Chargees lodged caveats during subsistence of equitable mortgagees' caveat — Equitable mortgagees' caveat lapsed and fresh caveat lodged — Whether equitable mortgagees' priority lost — Effect of s 40(1) of the Land Titles Act on lapsed caveat

D

The first defendant purchased a piece of property from the plaintiffs, and to finance the purchase the first defendant executed a deed of assignment in favour of the second defendants. The second defendants as equitable mortgagees lodged a caveat against the property. This caveat lapsed on 2 April 1986 and the second defendants lodged a fresh caveat on 3 September 1986. During the subsistence of the first caveat, the third defendants (claiming as chargee by virtue of a charging order) lodged a caveat on the property, and likewise the fourth defendants claiming as joint chargee. On 17 October 1986, the first defendant was adjudicated a bankrupt. The property was sold by the plaintiffs and the funds placed in a deposit account.

E

F

The senior assistant registrar held that the third and fourth defendants had priority over the claim of the second defendants in respect of the proceeds of the sale of the property by reason of s 41(1) of the Land Titles Act (Cap 157, 1985 Ed) ('LTA'). The second defendants had lost their priority in the fund to the third and fourth defendants when their first caveat lapsed on 3 April 1986, and the second defendants' second caveat was lodged after the caveats of the third and fourth defendants had been lodged. The second defendants were now appealing against the decision of the senior assistant registrar.

G

Counsel for the third and fourth defendants argued that: (i) the charging order had priority under s 41(1) of the LTA as the principle of *nemo dat* had no application; and (ii) the decision of the court in *United Overseas Finance Ltd v Mutu Jeras*² should not be followed as it did not take into account the effect of s 40 of the LTA.

H

Held, allowing the second defendants' appeal:

(1) The *nemo dat* principle had no application to cases where the property or interest in dispute is involuntarily acquired, as in execution proceedings.

(2) The first defendant had only an interest comprising an equity of redemption in the property as its rights, title and interest in the property had been assigned to the second defendants. The charging order could only have charged in favour of the third and fourth defendants what the first defendant had at the time the order was made (which was the first defendant's equity of redemption). The interest of the first defendant charged by the charging order was a limited interest, and did not impinge on the interest of the second defendants in the property. As such the interests of the parties were not conflicting interests and the question of priorities did not arise, and s 41(1) of the Land Titles Act had no application.

I

(3) Even if the court were wrong in holding that s 41(1) of the Land Titles Act had no application, the third and fourth defendants' claims must also fail on the ground of the bankruptcy of the first defendant occurring before the execution proceedings were completed. On the bankruptcy of the first defendant, the charging order ceased to have any effect and the third and fourth defendants lost their security in the property. The caveats lodged by the third and fourth defendants ceased to protect any interest which could be claimed by them.

(4) Section 40 of the Land Titles Act did not adversely affect the reasoning of the *Mutu Jeras* case² for the following reasons:

- (i) The word 'notification' in s 40 means the act of notifying a caveat on the land register, and the lapsing of the caveat cannot extinguish the act so carried out.
- (ii) Section 40(1) is not concerned with the loss of priority on the lapsing of a caveat but the gain of priority upon notification of any instrument creating or evidencing any interest.
- (iii) Section 40 deals with common law interests in land subsisting at the date of issue of a qualified certificate, instruments in respect of registered interests and unregistered interests created or subsisting after the land has been brought under the Land Titles Act. Priority of post-conversion unregistered interests is determined by s 41.

[Editorial Note: The third and fourth defendants have appealed to the Court of Appeal vide Civil Appeal No 26 of 1990.]

Cases referred to

- 1 *St Mary's Parish Credit Union Ltd v TM Ball Lumber Co Ltd* [1961] 27 DLR (2nd) 551 (refd)
- 2 *United Overseas Finance Ltd v Mutu Jeras* [1989] 3 MLJ 20 (refd)
- 3 *Bank of China v The First National Bank of Boston* [1988] 3 MLJ 401 (not folld)
- 4 *Fung Sin Wa v Moi Chan Hen* (1897) 4 SSLR 175 (refd)
- 5 *Ng Boo Bee v Khaw Joo Choe* (1921) 14 SSLR 90 (refd)
- 6 *Chung Khiaw Bank Ltd v United Overseas Bank Ltd* [1970] 1 MLJ 185 (refd)
- 7 *Re Tan Kiong Hwa* [1972] 1 MLJ 239 (refd)
- 8 *The Official Assignee of the Property of Lim Chiak Kim, A Bankrupt v United Overseas Bank* [1988] 3 MLJ 189 (refd)

Legislation referred to

Bankruptcy Act (Cap 20, 1985 Ed) s 49
Civil Procedure Code 1906 s 617(1)
Land Titles Act (Cap 157, 1985 Ed) ss 40(1), 41(1), 65(2), 113, 117(1), (2)
Rules of the Supreme Court 1970 O 50 r 1

George Pereira for the second defendants.
Chan Kok Chye for the third defendants.
Koh Kok Wah for the fourth defendants.

Cur Adv Vult

Chen Sek Keong J: This is an appeal by the second defendants against the decision of the senior assistant registrar that the claims of the third/fourth defendants had priority over the claim of the second defendants in respect of the proceeds of sale of a property known as 119 Sunset Way #06-01, Singapore ('the property').

The property had been purchased by the first defendant under an agreement for sale and purchase dated

13 March 1981 from the plaintiffs (the developers) at the price of \$410,252.50. To finance the purchase, the first defendant borrowed the sum of \$370,000 from the second defendants and executed a deed of assignment dated 27 March 1981 whereby he assigned all his right, title and interest in the property to the second defendants to secure the repayment of the loan. On 3 April 1981, the second defendants, as equitable mortgagees by virtue of the assignment, lodged a caveat against the property under the Land Titles Act (Cap 157, 1985 Ed) ('the LTA') prohibiting the registration of any instrument affecting the property. This caveat lapsed on the expiry of 2 April 1986 and the second defendants lodged a fresh caveat on 3 September 1986.

However, during the subsistence of the second defendants' first caveat, the third defendants, claiming as chargee by virtue of a charging order made on 30 August 1985 ('the charging order') in Suit No 1134 of 1985, had, on 9 October 1985, lodged a similar form of caveat against the property. The fourth defendants followed likewise on 20 November 1985, claiming as a joint chargee (with the third defendants under the charging order).

The operative part of the charging order ordered that:

- 1 The interest of the second defendant in the property at #06-01 Sunset Way Block 119, Singapore 2159 (Lot 4129/U97 Mukim 5, Pandan) comprised in the subsidiary strata certificate of title volume 176 folio 94 stands charged in favour of the plaintiffs and the Bank of Montreal who will hold the security jointly and in equal shares with the payment of \$3,184,070.81 the amount due from the said second defendant to the plaintiffs on a judgment of the High Court dated 29 April 1985 and interest thereon at 12.25% per annum from 23 January 1985 to date of judgment and \$700 costs together with \$205 the costs of this application, the said costs to be added to the judgment debt, and with the payment of \$2,173,548.86 the amount due from the said second defendant to the Bank of Montreal on a judgment of the High Court dated 5 August 1985 in Suit No 2089 of 1985 with interest thereafter at 8% per annum to payment and costs of \$700.

On 17 October 1986, the first defendant was adjudicated a bankrupt in Bankruptcy No 1395 of 1985 upon the petition of the third defendants. The act of bankruptcy, which was founded upon the first defendant's failure to comply with a bankruptcy notice, was committed on 31 August 1985.

On 14 May 1987, the plaintiffs (apparently in ignorance of the first defendant's bankruptcy), commenced an action in Suit No 1367 of 1987 against the first defendant for various reliefs and on 21 August 1987, in default of appearance, obtained an order of court for: (i) an order for specific performance of the agreement for sale and purchase dated 13 March 1981; (ii) a declaration that the plaintiffs had a lien on the property in respect of property for \$100,528.72 and interest thereon, being the balance of the unpaid purchase price; and (iii) an order that the plaintiffs be at liberty to enforce the lien by selling the

property upon the first defendant defaulting in the payment of the unpaid purchase price.

The first defendant, inevitably, defaulted in payment, whereupon the plaintiffs instead of selling the property pursuant to the said judgment, commenced this second (and quite unnecessary) action against the first defendant, and in which the second, third and fourth defendants were later joined as parties for the purpose of determining priorities. In this action the plaintiffs claimed (i) an order for sale of the property free from encumbrances by public auction or private treaty, with liberty to the plaintiffs to bid at the sale; (ii) an order that the caveats lodged by the first, second, third and fourth defendants be withdrawn; and (iii) an order that the proceeds of sale be applied in the following order of priorities: property tax, maintenance charges, cost of the sale; and (iv) an order that the costs of the plaintiffs be paid by the first defendant.

On 11 April 1988, the plaintiffs obtained (the Official Assignee on behalf of the first defendant not objecting) an order for the reliefs (i) to (iv) mentioned above, the payment of two other small sums, and for the balance of the proceeds of sale ('the fund') to be deposited in an interest bearing account until the determination of the respective priorities of the second, third and fourth defendants in the said proceeds. This sale was effected and the fund paid into a deposit account.

The priorities, inter se, of the second, third and fourth defendants' respective claims were determined before the senior assistant registrar. He held that by reason of s 41(1) of the LTA, the second defendants had lost their priority in the fund to the third/fourth defendants as their first caveat ceased to affect the property when it lapsed on 3 April 1986 and their second caveat was lodged after the caveats of the third/fourth defendants. Section 41(1) of the LTA provides as follows:

Except in the case of fraud, the entry of a caveat protecting an unregistered interest in land under the provisions of this Act gives that interest priority over any other unregistered interest not so protected at the time when the caveat was entered.

In this appeal, counsel for the second defendants has contended that the decision of the senior assistant registrar was wrong on the following grounds:

- (1) that s 41(1) applies only to interests which compete with each or one other;
- (2) that the interest of the second defendants did not compete with that of the third/fourth defendants under the charging order as the charging order could not vest in the second/third defendants an interest in the property which the first defendant did not have at the time the charging order was made, reference was made to the decision of the Supreme Court of Canada

in *St Mary's Parish Credit Union Ltd v TM Ball Lumber Co Ltd*;¹

- (3) the decision was contrary to my decision in *United Overseas Finance Ltd v Mutu Jeras*;² when it was decided by this court that on a true construction of s 41(1), the lapsing of a prior caveat did not deprive that caveator of his priority over any subsequent caveator who had lodged a caveat during the validity period of the prior caveat.

Counsel for the third/fourth defendants has contended otherwise, that (i) the charging order had priority under s 41(1) as the principle of *nemo dat non habet* had no application, and (ii) the decision in *Mutus Jeras*² should not be followed as it did not take into account the effect of s 40 of the LTA.

In support of the first ground, counsel for the third/fourth defendants relied on the decision of Lai Kew Chai J in *Bank of China v The First National Bank of Boston*.³ In that case, the execution creditors had obtained a charging order and lodged a caveat against the debtor's property at a time when the equitable mortgagees' caveat had already lapsed, and was no longer under that section. Lai Kew Chai J accepted the argument of counsel for the execution creditors on the basis of the authorities cited to him, viz *Fung Sin Wa v Moi Chan Hen*,⁴ *Ng Boo Bee v Khaw Joo Choe*,⁵ *Chung Khiaw Bank Ltd v United Overseas Bank Ltd*⁶ and *Re Tan Kiong Hwa*.⁷ His lordship held that priority was determined by the date of lodgment of the caveat as provided by s 41.

I shall consider first the argument based on the *nemo dat* principle. This principle applies to voluntary dispositions of property where the transferor purports to transfer to someone property which does not belong to him and in respect of which he has not been given any power to effect the transfer or where having transferred his property to someone purports to transfer the same property to a second person, thus giving rise to conflicting claims between the two transferees. The *nemo dat* principle has no application to cases where the property or interest is involuntarily acquired, as in execution proceedings. In such a case, the issue is not what the judgment debtor has purported to transfer or give to the judgment creditor but what the latter has purported to seize or attach or charge by way of execution. Thus, the relevant issue in the present case is the extent of the interest in the property that was acquired by the third/fourth defendants under the charging order. To determine this issue, two questions have to be asked: (i) what was the interest that the third/fourth defendants sought to charge when they applied for a charging order and (ii) what interest was given to them by the charging order. When the nature of the interest so acquired by the third/fourth defendants has been so determined, then one can proceed to the next issue whether such interest conflicts with that of the second defendants

so as to require a determination of priorities between the claims.

An illustration of this approach is found in the case of *Ng Boo Bee*.⁵ In that case, the judgment debtor had conveyed his property to and had received the full purchase moneys from the purchaser who had gone into possession. The judgment creditor obtained a writ of seizure and sale against the property and registered it under the Registration of Deeds Act before the purchaser registered his conveyance. The purchaser applied to set aside the execution and the creditor claimed priority, relying on the decision in *Fung Sin Wa*'s case.⁴ The Court of Appeal, by a majority, declined to treat the dispute as a contest of competing claims on the ground that the creditor could only seize what the debtor had. This followed from the court's construction of s 617(1) of the Civil Procedure Code 1906 which provided that the property that was liable to be seized was that *belonging to the judgment debtor*. The court held that the writ of seizure seized nothing because the debtor had nothing left in the property to be seized. Bucknill CJ said (at p 103):

The immediate inquiry is being directed, not as to whether the one or the other of these two assurances shall have priority, but as to whether the earlier in date is intrinsically of any force or effect: in other words whether the property seized belonged at the date of seizure to the judgement debtor or not.

No question of priority as between the two assurances could in my opinion therefore arise until it had been decided the property seized did at the date of the seizure belong to the judgment debtor and the writ of seizure was intrinsically good."

In relation to the first issue, reference may be made to the affidavit of Lai Mun Kwan filed on 24 July 1985 in Suit No 1134 of 1985 wherein was exhibited a copy of the relative subsidiary certificate of title endorsed with the caveat lodged by the first defendant and the caveat of the second defendants. The application was for an order that the property or the interest of the first defendant be charged with the payment of the judgment debt. The charging order that was obtained was in similar terms. What was the interest of the first defendant? It was only the equity of redemption in respect of the property described in the charging order as the first defendant's right title and interest in the property had been assigned to the second defendants. Order 50 r 1(4) requires the judgment creditor to state on affidavit the interest in immovable property which he seeks to impose a charge. The form of the charging order nisi prescribed by the 1970 Rules (Form 103) requires the execution creditor to describe the interest that the debtor is *entitled to*. Clearly, the charging order could only have charged what the first defendant had at the time it was made, which was the equity of redemption. In any case, the court had no power to make any charging order except one which charged

A whatever interest the judgment debtor had in the property. Having had notice of the second defendants' interest in the property, the third/fourth defendants could not have intended to charge that part of the interest that was vested in the second defendants and which were then protected by a caveat.

B It needs to be stated that when the court makes a charging order, the court is not concerned with the priority of the charging order as against other claims to the same property. The court is only concerned with what the judgment creditor seeks to charge and what it can order by way of execution. If the third/fourth defendants had intended to charge or had obtained a charging order purporting to charge *that* interest, the charging order would have been set aside or varied on an application by the second defendants.

In my view, the position of an execution creditor who obtains a charging order against any immovable property of the debtor already subject to an existing mortgage is analogous to that of a lender who knowingly accepts a mortgage on the residual interest of a mortgagor who has already granted a first mortgage on the same property. The interest is the same. The execution creditor intends to charge whatever the law can give him, which is whatever the debtor has. Similarly, the second mortgagee intends to accept whatever the mortgagor has, which is what remains in the property after the first mortgage. In *St Mary's Parish Credit Union Ltd v TM Ball Lumber Co Ltd*,¹ there was a contest between two equitable mortgagees for priority. The second mortgagees caveated their interest before the first mortgagees caveated theirs. Although the statute in question, the Land Titles Act (RSS 1953) did not contain a provision corresponding to s 41(1) of the LTA, it contained a provision that priority of instruments affecting the same land shall be in accordance with the date of registration and not the date of execution. The Supreme Court of Canada held that the second mortgagees did not have priority as, on the evidence, they, having been informed of the existence of the first mortgage, had agreed with the mortgagor that their second mortgage would only be on the mortgagor's equity of redemption. The court held that in this situation, the two equitable mortgages did not affect the same interest in the land and were therefore not conflicting. The court also held that if the second mortgage had been registered, it could only have effect 'according to the intent or tenor thereof' by virtue of s 65(2) of the Land Titles Act.

I In my view, the interest of the first defendant charged by the charging order was a limited interest. That interest did not impinge on the interest of the second defendants in the same property. It was limited to whatever interest that the first defendant had in the property, which was the right to redeem the interest assigned to the second defendants. The filing of caveats by the third/fourth defen-

dants could not increase or extend their interest under the charging order. In my view, the interests of the parties were not competing interests and accordingly the question of priority *inter se* did not arise. The third/fourth defendants could not have been in a better position than the first defendant vis-a-vis the second defendants. Section 41(1) has no application to unregistered interests in land that are not competing interests.

In relation to execution proceedings against registered land, it is pertinent to observe that when the LTA was enacted in 1956 to provide for a new system of land registration, the prescribed mode of execution against registered land was by way of writ of seizure and sale which has to be registered in the land register before it can bind the land. Section 117(1) and (2) provide as follows:

- (1) The interest in registered land which may be sold in execution under a writ is the interest which belongs to the judgment debtor at the date of registration of the writ.
- (2) For the purpose of determining the interest in land which belongs to the judgment debtor —
 - (a) ...
 - (b) any interest in land created previously to the date of registration of the writ, and not notified in the land register nor protected by a caveat at least 3 clear days before the sale,

is void against a purchaser of the land at the sale in execution under the writ.

The effect of para (b) of s 117(2) is to make the land register conclusive as to the interest of the judgment debtor that will be passed on to the purchaser upon the sale. But the provision clearly recognizes the principle under the general law that the execution creditor cannot seize what the debtor does not have. In order to give effect to the principle of the conclusiveness of the land register and to ensure that a bona fide purchaser at the sale is not subject to prior unregistered interests, the provision destroys such claim by rendering void if they are not registered or notified within three clear days from the date of the sale. This is still the only means of execution specifically provided for in the Act: see s 113. The charging order as an alternative mode of execution against immovable property was introduced in 1970 under the Rules of the Supreme Court 1970 ('the 1970 Rules'). If counsel for the third/fourth defendants is correct in his submission, then O 50 r 1 would have the effect of giving greater rights to execution creditors against registered land than was contemplated by the legislature under the LTA.

In my view, the decisions referred to in the *Bank of China* case³ and relied upon by counsel for the third/fourth defendants, viz *Fung Sin Wa's* case,⁴ the *Chung Khiaw Bank* case,⁶ *Re Tan King Hwa*⁷ or *Ng Boo Bee*⁵ are relevant to the present case. *Fung Sin Wa's* case⁴ was decided on a construction of s 7(3) of the Registration of Deeds Act, and in the *Chung Khiaw Bank* case,⁶ the Privy

A Council accepted as correct the decision in *Fung Sin Wa's* case⁴ that a writ of seizure of sale when registered was an 'assurance for valuable consideration' and therefore by reason of s 7(3) of the Registration of Deeds Act, the execution creditor had priority. *Ng Boo Bee's* case,⁵ as we have seen, applied the general law principle to defeat the claim of the execution creditor. This decision was not referred to by the Privy Council without disapproval in the *Chung Khiaw Bank* case.⁶ *Re Tan King Hwa*⁷ is the only case where the *nemo dat* principle was relevant as the owner purported to sell the same property to two purchasers. Their interests were competing interests and the court held that s 41(1) applied to determine priority.

C It would appear that in the *Bank of China* case,³ Lai Kew Chai J considered that the interest of an execution creditor under a charging order did compete with that of a prior equitable mortgagee in respect of the same property, and his Lordship decided that the later interest had priority as the prior caveat protecting the mortgagee's interest had already lapsed and not renewed at the time the creditor lodged his caveat. However, this is not the case here as at the date of the charging order absolute and the lodgment of the caveat to protect the interest therein, the equitable mortgagee had a *subsisting* caveat protecting his prior interest. For this reason, I hold that the *Bank of China* case³ is not applicable to the present case.

E Even if I am wrong in my finding that s 41(1) has no application because the interests of the parties are not competing, the third/fourth defendants' claim to priority must also fail on the ground of the bankruptcy of the first defendant before the execution proceeding was completed.

F In *The Official Assignee of the Property of Lim Chiah Kim, A Bankrupt v United Overseas Bank*,⁸ which was decided one week after the *Bank of China* case,³ the Court of Appeal held that an execution creditor who had obtained a charging order against the land of the judgment debtor lost its status as a secured creditor under the charging order where the debtor was made a bankrupt before the execution could be completed by sale of the property charged thereunder. The basic facts of the case were simple. Lim was the registered proprietor of the property in question. BOC was the registered mortgagee and UOB was the execution creditor who had obtained the charging order absolute and lodged a caveat to protect the security given thereby. UOB did not complete the execution by sale. It was BOC who, as mortgagee, sold the property, paid itself off first and the balance of the proceeds of sale to the Official Assignee (Lim having then been adjudicated a bankrupt). The question was whether UOB or the Official Assignee was entitled to the said balance. Two issues were canvassed before the court: (a) whether the charging order constituted a charge on the property, and (b) if the answer was Yes, whether UOB was entitled to payment under its charging order. The Court of Appeal

decided that a charging order created a statutory charge (which was not a legal charge) on registered land, but that because the charging order was also a mode of execution, it was not completed by sale, and accordingly, upon the bankruptcy of the debtor, the execution creditors lost the benefit of the execution by virtue of s 49 of the Bankruptcy Act (Cap 20, 1985 Ed).

The Court of Appeal in effect held that a charging order absolute was defeasible upon the bankruptcy of the judgment debtor before the completion of the execution. Upon the happening of that event, UOB lost its status as a secured creditor under the charging order.

In the present case, the third/fourth defendants had not completed their execution when the first defendant was made a bankrupt on 17 October 1986. On that date, the charging order ceased to have effect and the third/fourth defendants lost their security in the property of the first defendant. The caveats lodged by the third/fourth defendants ceased to protect any interest which could be claimed by them, the same having been destroyed by the bankruptcy of the first defendant. I do not think that the third/fourth defendants can get over this obstacle in their claim on the ground that the issue of priority between them and the second defendants is a separate issue from that of the right of the Official Assignee against them under s 49(1) of the Bankruptcy Act (Cap 20, 1985 Ed). In my view, the two issues are inextricably linked, as the claim of priority of the third/fourth defendants is founded on their having a secured interest in the property in the first place. Section 49(1) of the Bankruptcy Act (Cap 20, 1985 Ed) is not expressed in terms which render the execution voidable. It is expressed in terms which render it void in conformity with the statutory scheme for equal distribution of the bankrupt's assets in bankruptcy.

I do not find this result surprising, as the Official Assignee, on succeeding to the benefit of the execution, would find that he would not be able to resist the claim of the second defendants as equitable mortgagees, whether or not they have a subsisting caveat against the property. As between a secured creditor of the bankrupt and the Official Assignee, the question of priority does not arise at all.

I turn now to the second argument of counsel for the third/fourth defendants that my decision in *Mutu Jeras*² was wrong as it failed to take into account the effect of s 40(1) of the LTA. Section 40(1) reads:

Except as provided in section 20(7), interests appearing in the land-register have priority according to the order of their registration or notification, irrespective of the dates of the instruments by which those interests were created or are evidenced.

The argument of counsel ran as follows: (i) that under s 40(1), interests appearing in the land register had prior-

- A ity according to the date of registration or notification of the relative instruments creating or evidencing them, (ii) that unregistered interests protected by caveats are notified and therefore s 40(1) applied to all caveats, (iii) that the word 'notification' meant a 'live' or subsisting and not a dead notification. Upon the lapsing of the second defendants' first caveat, the notification in respect of that caveat also lapsed. It became a dead notification and was therefore not a notification for the purpose of the section. Hence, the third/fourth defendants' had priority as their caveats were notified at a time when the notification of the second defendants' caveat had lapsed. I do not accept this argument for the following reasons. First, the word 'notification' means the act of notifying a caveat on the land register. An act of notifying cannot be dead or live. It refers to a historical act. Once it is done, it is done. The lapsing of a caveat cannot extinguish the act. Secondly, s 40(1) is not concerned with the loss of priority on the lapsing of a caveat but the gain of priority upon the notification of any instrument creating or evidencing any interest. Moreover, it is doubtful whether a caveat evidences an interest in land: it certainly does not create any interest in land. Thirdly, s 40(1), in my view, deals with common law interests in land subsisting at the date of issue of a qualified certificate (see s 20), instruments in respect of registered interests and not unregistered interests created or subsisting after the land has been brought under the Act. Priority of post-conversion unregistered interests is determined by s 41.

- F Counsel has not persuaded me that s 40 adversely affects my reasoning in *Mutu Jeras*.²

For the above reasons, the appeal is allowed with costs here and below. There will be a declaration that the second defendants have a prior claim to the fund.

Appeal allowed.

- G Solicitors: *Foo & Quek; Chu Chan Gan & Ooi; Arthur Loke & Partners.*

Reported by *Teoh Ai Lin*

H

I